which in fact belongs to the plaintiff, *Boyett* v. *Potter* (1886) 80 Ala. 476; semble, *State* v. *St. Johnsbury* (1887) 59 Vt. 332, but many jurisdictions are contra which deny a recovery when the defendant claimed in his own right. *Patrick* v. *Metcalf* (1867) 37 N. Y. 332; *Nolan* v. *Manton* (1884) 46 N. J. L. 231. Such decisions are attributable largely to the mistaken idea that actual assent is necessary, *Sergeant* v. *Stryker* (N. J. 1838) 1 Harr. 464, or that the relationship of principal and agent is fundamental, Keener, Quasi-Contracts, 167, or that the payment must have discharged the debt. *Patrick* v. *Metcalf, supra.* It is certainly anomalous for courts to admit that recovery in such cases would be in every sense conformable to natural justice, *Butterworth* v. *Gould* (1869) 41 N. Y. 450; *Sergeant* v. *Stryker, supra,* and then deny a remedy based thereon.

In a recent case the defendant by means of a non-negotiable order, drawn but never delivered, by the plaintiff, wrongfully procured the transfer to her account of the plaintiff's deposit in a savings bank. A recovery was properly denied. *Earle* v. *Whiting* (Mass. 1907) 82 N. E. 32. As shown by the foregoing principles, the assumption of the court that the action would lie had the plaintiff drawn out the money, was correct, whether, according to the by-laws of the bank, see *Levy* v. *Franklin Sav. Bank* (1875) 117 Mass. 448, the payment would or would not have discharged the bank's obligation to the plaintiff. But the defendant received nothing but a bare credit, against which the bank had a perfect defense. *Commonwealth* v. *Scituate Sav. Bank* (1884) 137 Mass. 301. Though recovery may be had where the defendant has received a credit on account, *Houser* v. *McGuinas* (1891) 108 N. C. 631, it proceeds upon the ground that some debt against the defendant has to that extent been cancelled, so that he has received "money's worth." *Danworth* v. *Dewey* (1824) 3 N. H. 79. In the principal case, therefore, the plaintiff failed in an essential element in his cause of action.

PRESUMPTIONS OF LAW AS EVIDENCE.—It is maintained by some writers, Thayer, Prel. Treat. Evid. 563, 575; 4 Wigmore, Evid. §§ 3529, 3536, and an increasing number of courts, *Vincent* v. *Mutual Life Ass'n* (1904) 77 Conn. 281, that the only effect of a legal presumption as a presumption of law is to throw on the party against whom it operates the burden of going forward with the evidence. Under this view three elements may be present: first, the presumption, as such, requiring a decision in the proponent's favor in the absence of "some evidence to the contrary;" second, the logical inference arising from the facts upon which the presumption is based; third, a rule of substantive law accompanying, but not part of, the stronger presumptions, demanding a certain kind of evidence or degree of proof. It being theoretically for the judge to determine when enough "evidence to the contrary" has been established to cause the presumption as such to disappear, Wigmore Evid., *supra,* an exact application of the theory would require a charge stating what facts and combinations of facts—with due regard to the degrees of belief in the minds of the jury—would satisfy the judge's mind of such evidence. This is of course impracticable since a concise charge is necessary, and the spirit of the theory is complied with by simply emphasizing the disappearance of the presumption as such in the presence of some evidence to the contrary. While this theory seems

analytically a sound one, the fact remains that under charges as commonly given a certain weight beyond that arising from the logical inference is imparted to the presumption of law. While the courts do not often separate the artificial from the rational force, *Clayton* v. *Wardell* (1850) 4 N. Y. 230; *Piers* v. *Piers* (1849) 13 Jurist. 569, 572; *Carpenter* v. *Calvert* (1876) 83 Ill. 62; *Waddingham* v. *Waddingham* (1886) 21 Mo. App. 609, the common charge that the presumption remains until rebutted, *In re Marlo's Estate* (1906) 103 N. Y. Supp. 161, 166, overcome, *People* v. *Sanders* (1896) 114 Cal. 216; *Cogdell* v. *R. R. Co.* (1903) 132 N. C. 852, or destroyed by evidence to the contrary, Thayer Prel. Treatise Evid. 575, seems to impart more or less artificial force to the presumption in the minds of the jury. Whether it reach them in the form of a conclusion of law closely bound up with the rational inference or through the medium of a more or less unconscious coloring of the facts, the jury find nothing illogical in balancing the presumption as a whole against other logical inferences. The presumption having in fact probative force with the jury under the common charges, it is in a broad sense evidence and it is not surprising therefore that a number of courts have boldly held legal presumptions to be evidence, *Coffin* v. *United States* (1895) 156 U. S. 432; *McNey* v. *State* (1899) 57 Neb. 471; *State* v. *Schelly* (1902) 166 Mo. 616, or at least repudiating the other theory have held that they were to be weighed by the jury along with the evidence. *In re Cowdry's Will* (1905) 77 Vt. 359; *Sturdevant's Appeal* (1899) 71 Conn. 392; *Kirby* v. *United States* (1899) 174 U. S. 47; semble, *Johnson* v. *Johnson* (1900) 187 Ill. 86; cf. *Dunlop* v. *United States* (1879) 165 U. S. 486; *State* v. *Kennedy* (1900) 154 Mo. 268. Thus in a recent case in Vermont it was held error not to charge that the legal presumption of undue influence was itself a piece of evidence to be overcome by counterproof. *In re Rogers' Will* (Vt. 1907) 67 Atl. Rep. 726.

Theoretically there would seem to be no difference in the results reached by the two theories: under the first, a higher degree of proof is required to overcome the rule of substantive law accompanying the presumption; in the second, more evidence to rebut the presumption. There might well be a practical advantage, however, in presenting the presumption to the jury as an inference, thus avoiding a more complicated rule as to degree of proof. Moreover it is evident that the second view gives the trial judge greater control because it allows him to vary the artificial weight of the presumption according to its proper relative importance in connection with the other proof factors. Certainly trial judges are allowed great freedom in conveying to the jury the relative importance of the presumption in the case at bar. He may destroy its effect by special reference to the nature of the evidence; *Fire Ins. etc. Co.* v. *Merchants etc. Co.* (1881) 54 Vt. 657; or leave it to the common sense of the jury by merely calling it a probative factor, *Sturdevant's Appeal, supra,* or give it the arbitrary force of turning the scales when the evidence is balanced, *Barber's Appeal* (1893) 63 Conn. 393, or is doubtful. *Hawkins* v. *Grimes* (Ky. 1852) 13 Monroe 257. The necessity for simplicity and conciseness, however, has lead to a series of conventional charges which are non-committal and consistent with either view. This is best illustrated in the leading jurisdiction

supporting the view that presumptions are evidence, by the case of *Coffin* v. *United States, supra,* where the charges as originally given were substantially the same as those later given on the new trial. The growth of certain presumptions (death from seven years' absence) and the declining strength of others (legitimacy in England) seem more explicable on the theory that courts have regarded legal presumptions as a matter of evidence peculiarly within their control than that they were consciously formulating rules of substantive law. In view of this development; of the admittedly equivocal discussion of legal presumptions in many cases; of the many precedents for instructions rather favoring this theory; and of the practicability of conveying an artificial strength to a logical inference to be formed by the jury—this theory, though less scientific, scarcely deserves the severe criticism that it has suffered.

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POWER OF TRUSTEES TO LEASE FOR A TERM EXTENDING BEYOND THE TRUST ESTATE.—When real property is impressed with a trust for the life of a beneficiary, the power of the trustee to lease may be viewed from the standpoint of the cestui que trust, or from that of the remainderman in fee. Whether the trustee acted with prudence as to rents, tenants, length of term, etc., are questions that concern the cestui; only the length of term affects the remainderman. For if it extend beyond the trust estate, the remainderman will take, not the property, as intended, but only the income. *Gomez* v. *Gomez* (1894) 81 Hun 566. Cases directly concerned with this power in either aspect are not numerous and the courts have sometimes not been careful in examining authorities to distinguish between the two questions respectively presented. If the trustees have implied or express power to lease, but the will or deed is silent as to the term, the lease granted may be one certain to bind the ultimate owner, as where there is a permanent lease, *Hitch* v. *Davis* (1853) 3 Md. Ch. 262, or, as in a recent case, a ninety-nine year lease, *In re Hubbell Trust* (Ia. 1907) 113 N. W. 512, or for a term of years with covenants for renewal. *Newcomb* v. *Ketteltas* (N. Y. 1855) 19 Barb. 608; *Bergengren* v. *Aldrich* (1885) 139 Mass. 259. Or it may be that the lease granted is for a short term, and the remainderman's interest be threatened only by the premature death of the cestui. As upholding the right to benefit the cestui by leases which may operate on the remainderman, *Naylor* v. *Arnitt* (1830) 1 R. & M. 502, *Fitzpatrick* v. *Waring* (1882) 11 L. R. Ir. 35, contra, *In re Shaw's Trusts* (1871) L. R. 12 Eq. Cas. 124, are often cited. These English cases do not deal with the leasing power from the remainderman's standpoint, but seem merely to determine whether the trustee could lease at all. *Newcomb* v. *Ketteltas, supra,* is the same: the trust estate had not expired and the court was concerned with the immediate status of the lease. The earliest case in this country is *Hitch* v. *Davis, supra,* where the bill asking authority to lease was dismissed because those ultimately entitled would be injured. *Greason* v. *Keteltas* (1858) lends some weight to the opposite view; but the trust was in continuance and the court merely looked to the prudence and good faith of the trustees as affecting the beneficiaries. It is doubtful if these two cases support the proposition that the trustees have